

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

April 20, 2010

10:05 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Motion for Authorization to Purchase and
Sell Notes Issued by Certain Special Purpose Vehicles [Docket
No. 7920]

HEARING re Motion of Simeon Moreno to Confirm Termination or
Absence of Stay (Simeon Moreno's Motion for Declaration That
the Automatic Stay Does Not Apply and That His Claims
Constitute Administrative Expenses of the Estate) [Docket No.
7924]

HEARING re Motion of Simeon Moreno to (1) Deem Proof of Claim
as Timely Filed; (2) for Relief from the Automatic Stay; (3)
for Permission to Attend Hearing via Telephone Conference; and
(4) for Exemption from Service Requirements as to Certain
Parties in the Master Service List [Docket No. 7366]

HEARING re First Motion of Mark Glasser to Extend Time for
Claim [Docket No. 6386]

HEARING re Motion of Pacific Life Insurance Company to File
Proof of Claim After Claims Bar Date [Docket No. 5599]

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HEARING re Joint Motion of Sea Port Group Securities, LLC and
Berner Kantonalbank to Deem Proofs of Claim to be Timely Filed
by the Securities Programs Bar Date [Docket No. 6150]

HEARING re Motion of Pennsylvania Public School Employees'
Retirement System for Entry of an Order that its Timely Filed
Guarantee Questionnaire be Considered a Timely Filed Proof of
Claim [Docket No. 6558]

HEARING re Motion of Dynegy Power Marketing Inc. for Entry of
an Order that its Timely Filed Guarantee Questionnaire be
Deemed a Timely Filed Proof of Claim [Docket No. 7008]

HEARING re Amended Motion of Tensor Opportunity Limited to
Permit it to File a Late Proof of Claim [Docket No. 7162]

HEARING re Motion to Authorize Santa Fe Entities to Treat Their
Claims as Timely Filed [Docket No. 7144]

HEARING re CVI GVF (LUX) Master S.A.R.L.'s Motion to Treat
Claim Filed by Black River Asia Fund Ltd. as Timely Filed
[Docket No. 7290]

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P R O C E E D I N G S

THE COURT: Be seated, please.

Good morning.

MR. WAISMAN: Good morning, Your Honor. Shai Waisman, Weil, Gotshal & Manges, for the Lehman debtors.

Your Honor, Lehman's omnibus -- well, not omnibus hearing but carryover matters, this morning's calendar -- we filed an amended agenda letter yesterday evening; it reflects one contested matter, other than claims-related issues, that we would handle first; my first partner Rick Levine will handle that. And then we could move to the claims portion of the agenda, three contested matters there, and then just a slew of other matters that have been on submission.

THE COURT: Fine.

MR. WAISMAN: So the first matter this morning, Your Honor, item number 1 under contested matters, debtors' motion for authorization to purchase and sell notes issued by certain special-purpose vehicles, response deadline, Your Honor, was April 13th. We received one objection, the objection of U.S. Bank National Association. And the creditors' committee filed a statement in support. With that, I would turn over to my partner.

MR. LEVINE: Good morning, Your Honor. Richard Levine from Weil Gotshal, for the debtors.

Your Honor, the debtors filed this motion, with the

1 support of the committee, as Mr. Waisman pointed out, as part
2 of their ongoing efforts to maximize recovery from existing
3 investments. As the Court is aware, prior to the filing of
4 these cases, the debtors, in the regular course of their
5 business, entered into various transactions with special-
6 purpose vehicles, SPVs; these were either derivative contracts
7 or loan agreements. The SPVs then issued notes, which were
8 supported by collateral; that collateral also protected the
9 debtors' right to recover under their contracts with the SPVs.

10 In many cases, based on terminations of the colla --
11 of the derivative agreements between the debtors and the SPVs,
12 or otherwise, the debtors were owed a lot of money by the SPVs
13 as of the petition dates and as of today. Many of the SPVs,
14 however, as Your Honor is aware from one or more particular
15 cases, have taken the position that the debtors' priority-of-
16 payment rights with respect to the collateral became
17 subordinated to the rights of the noteholders as a result of
18 the SPVs declaring an event of default directly tied to the
19 debtors' filings for relief under Chapter 11. As Your Honor
20 knows, it is the debtors' position in such cases that any such
21 change to the priority of payment violates the ipso facto
22 clause. And obviously the debtors have resumed litigation with
23 that regard and have been fairly successful today.

24 There are others of these SPVs where there are
25 different disputes, largely relating to situations where the

1 noteholders have been unwilling or unable to direct the
2 liquidation of the collateral so that the situation is frozen
3 and the debtors can't recover what they're owed under the
4 derivative contracts. The debtors have been engaged in a
5 multi-prong effort to try to address these situations; that
6 effort includes litigation both here and overseas, it includes
7 alternate dispute efforts and includes negotiations. However,
8 the debtors and their financial advisors, in consultation with
9 the committee and its advisors, have concluded that there is
10 another alternative which in particular cases and in particular
11 circumstances, and in the exercise of the debtors' business
12 judgment on a case-by-case basis, may be the most efficient and
13 best method of trying to resolve these disputes, and that's to
14 allow the debtors to go out into the marketplace and, either in
15 face-to-face negotiations or through markets, purchase the
16 notes of these SPVs.

17 The debtors consider this to be ordinary-course
18 business. However, for an abundance of caution and to make
19 sure that there's full disclosure, they have filed this motion
20 to make sure that they have the authority.

21 The debtors believe that the acquisition of notes
22 issued by SPVs may serve a number of purposes in maximizing the
23 debtors' ability to recover on their existing investments. As
24 described in the motion, the debtors seek authority to purchase
25 the notes issued by SPVs with respect to which the particular

1 debtor who would buy the notes has an existing derivative
2 contract or loan agreement. The debtors may seek to acquire
3 notes at a discount. Many of these notes are trading at a
4 discount, we believe largely because of the market's
5 recognition of the ipso facto issue and the fact that there's a
6 considerable issue as to where the priorative (sic) payments
7 will lay, and because noteholders are aware that if the debtors
8 win on the ipso facto issue, much of the money will go to the
9 debtors. The notes are trading at a discount, and if the
10 debtors -- based on the particular terms or particular SPVs, if
11 the debtors acquire a sufficient number of the notes or a
12 percentage of the notes, they may be able to direct the
13 liquidation of the collateral.

14 Another situation is acquiring notes at discount may
15 serve as a hedge against litigation risk, either in this court
16 or, probably more likely in terms of the hedging, in a court
17 overseas.

18 Third, the debtors may be able to direct the
19 indentured trustee or noteholders, if they accumulate a
20 sufficient position in notes, to settle litigation with the
21 debtors, or at least allow the debtors to negotiate a
22 settlement that they could not otherwise, because the debtors
23 will also be able to take into account their recovery on notes
24 above whatever purchase price they pay.

25 As the Court is aware, the documentation relating to

1 these SPVs and derivative loan contracts are very complicated.
2 While the debtors have had success at challenging the
3 modification of the priority of payment to date in certain
4 deals, the language in the documents differs from deal to deal,
5 the facts differ from deal to deal, and the expense of
6 litigating these matters, given the number of them, would be
7 enormous.

8 Thus, the debtors, in consultation with the committee,
9 have moved this Court for permission, pursuant to Sections
10 105(a) and 363(b)(1) of the Code, to establish procedures
11 detailed in the motion by which they may purchase, either in
12 the open market or through private negotiations with current
13 noteholders, notes issued by SPVs with which the particular
14 debtor is a party to a transaction agreement, the right to
15 exercise whatever contractual legal rights may come as a holder
16 of notes, and the right to sell any purchase notes if
17 circumstances change, and, in the business judgment of the
18 debtors, selling notes makes sense.

19 The debtors believe this relief is consistent with
20 relief the Court has granted the debtors with respect to
21 investments, to enhance or preserve recoveries on real estate
22 and with respect to hedging transactions.

23 As Your Honor is aware, not only was the committee
24 involved in developing the concept behind and the procedures
25 set forth in the motion, but it's filed a statement of support.

1 Moreover, not a single economic stakeholder has objected. We
2 think that's because parties which understand the nature of
3 these instruments and these markets believe that what the
4 debtors are proposing to do makes sense. In a given case, it
5 may be that by buying out a particular minority noteholder
6 there's no longer any dispute and a settlement can be easily
7 reached and the minority noteholder has made a business
8 decision to sell the notes to the debtors. So there are all
9 kinds of circumstances where it just may make a lot of sense
10 and may be a very efficient and economically --

11 (Phone ringing over loudspeaker)

12 MR. LEVINE: -- attractive way to go.

13 THE COURT: I believe that CourtCall just joined.
14 They missed the best part of your argument.

15 MR. LEVINE: All the jokes are still coming, Your
16 Honor.

17 THE COURT: All right, great. I look forward to
18 those.

19 MR. LEVINE: The only objection was filed by U.S. Bank
20 in its capacity as a trustee for some of these SPVs. U.S.
21 Bank, in such capacity, objects that the proposed transactions
22 would be speculative and that it's an improper use of the
23 assets of the debtor. While the debtors understand that these
24 types of purchases and sales of notes are not typical, this is
25 not a typical bankruptcy. And the debtors were involved in

1 these business pre-petition and need the flexibility, under
2 appropriate oversight by the committee or, if the committee
3 doesn't agree, by the Court, to hedge and maximize the value of
4 these transactions. This is not an effort to enter into new
5 business; this is not an effort to make new investments. This
6 is an effort to maximize the return from existing investments.
7 Thus, we do not believe these proposed transactions are
8 governed by Section 345(a) of the Bankruptcy Code.

9 We actually suspect that what U.S. Bank is concerned
10 about is a situation in which it already finds itself: It is
11 caught in the middle. Obviously, U.S. Bank, as trustee, has
12 taken the position that the event-of-default language changing
13 the priority of payment does not violate the ipso facto clause.
14 The debtors obviously disagree. And we believe U.S. Bank is
15 concerned that in some hypothetical circumstance down the road
16 there may be a situation where the debtors, say, own the
17 majority of notes and there are minority noteholders who are
18 objecting, telling U.S. Bank you can't listen to the debtors
19 even though they hold a majority, because they have a conflict
20 of interest.

21 Your Honor, that could happen. We don't know; it may
22 not happen. But the key thing, we think, for this motion is
23 that the debtors are not seeking any relief whatsoever with
24 respect to that circumstance. If -- all the debtors are not
25 asking the Court to prejudge what the debtors' rights would be

1 in that circumstance, and the debtors are not asking the judge
2 to prejudge what rights or remedies other noteholders or the
3 SPVs or the trustees would have. If there are such disputes,
4 they'd, to use language I should never use, abide the event,
5 because hopefully that'll never happen or there'll be
6 settlements or everything will be worked out. But if there are
7 disputes, they can be litigated in the appropriate forum at the
8 appropriate time.

9 In that regard, both our motion and our reply
10 expressly made the point that we're not looking for Your Honor
11 to rule in any way on what the debtors' rights would be as
12 noteholders or what the rights would be of other noteholders.
13 And speaking to Mr. Top, counsel for U.S. Bank, this morning, I
14 said that to the extent he would be -- some of his concerns
15 would be addressed by adding some language to the order to make
16 that clear in the order, we're happy to work with him to do
17 that, because it really is not our purpose here to get Your
18 Honor to prejudge any of those issues.

19 The other objections asserted by U.S. Bank really go
20 to those very issues, and, again, we don't think they're really
21 ripe at this moment, because we're not seeking relevant relief
22 and, frankly, we think they're wrong on the law, as we set
23 forth in the reply, but we don't think Your Honor needs to get
24 there today.

25 I guess the final point is that we are -- question

1 whether what U.S. Bank is doing is precluding the opportunity
2 of noteholders who may want to sell to the debtors, should the
3 debtors be interested, from having that opportunity to sell
4 their notes. And, again, we don't think that's something which
5 this Court should be precluding, based on whatever concerns
6 U.S. Bank has as trustee.

7 Your Honor, we submitted in support of this motion a
8 declaration of Daniel Ehrman (ph.). Unfortunately, Mr. Ehrman
9 is not here today because he's attending the protocol meetings.
10 We're prepared to make a proffer of the testimony of Mr. Locke
11 McMurray, a managing director of the debtors, who is prepared
12 to testify, who was completely involved in the work that led up
13 to the motion and can testify to whatever Mr. Ehrman was
14 prepared to testify to. Though I don't think that U.S. Bank's
15 objection raises any factual issues, we're prepared -- we are
16 prepared to proceed with a proffer just based on Mr. Ehrman's
17 declaration or by making a formal proffer of what Mr. McMurray
18 would testify to, or by calling Mr. McMurray to the stand,
19 whatever Your Honor would find most helpful.

20 THE COURT: Well, let me find out if U.S. Bank, the
21 only objector, has any issues with my considering the existing
22 declaration of Mr. Ehrman even though he's not present, and how
23 U.S. Bank would prefer we deal with the testimony of Mr.
24 McMurray.

25 MR. LEVINE: Thank you, Your Honor.

1 THE COURT: Is U.S. Bank here?

2 Why don't we just limit your response to simply the
3 evidentiary question which is before the Court.

4 MR. TOP: Your Honor, our objection to this particular
5 motion really has nothing to do so much with the facts that
6 were submitted in connection with it; rather, just a legal
7 question.

8 THE COURT: Do you have any objection, then, to my
9 consideration of the declaration and any proffer that might be
10 offered?

11 MR. TOP: I do not.

12 THE COURT: Fine.

13 Okay, I'll hear the proffer if you want to make it;
14 otherwise, you can rest on the declaration.

15 MR. LEVINE: Your Honor, we're happy to rest on the
16 declaration.

17 THE COURT: Fine. I --

18 MR. LEVINE: Mr. McMurray's here if the Court has
19 questions.

20 THE COURT: Fine. I accept the declaration as the
21 evidentiary support for the motion.

22 (Declaration of Daniel Ehrman (ph.) was hereby received into
23 evidence as a Debtors' exhibit, as of this date.)

24 THE COURT: And I think I should hear from the
25 creditors' committee and then hear from U.S. Bank; that way,

1 proponents of the motion have gone first.

2 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank,
3 Tweed, Hadley & McCloy, on behalf of the creditors' committee.

4 As Mr. Levine indicated, we did, through -- the
5 committee, through its derivative subcommittee, did work
6 closely with the debtors on this motion and the procedures
7 behind it. We addressed both the prudence of the proposed use
8 of the funds, and we do believe that, given the limitations and
9 the oversight that the committee will have on it, that these
10 funds will be used in a prudent way, consistent with other uses
11 of estate assets, to preserve and protect and advance the
12 interests of the estate and other asset classes.

13 We're also comfortable that the procedures that are
14 proposed that would involve the committee and its advisors in
15 the process on a real-time basis will ensure that we have the
16 opportunity to ensure that the use of the funds will in fact be
17 prudent, and also believe that the objections raised by U.S.
18 Bank largely are not ripe for the Court to address today. They
19 relate to issues that could be raised down the road if certain
20 circumstances come to pass, and can be addressed at that time.
21 There's no need to address them in the context of approving the
22 motion.

23 THE COURT: All right, thank you.

24 MR. TOP: Good morning, Your Honor. Frank Top from
25 Chapman and Cutler, and I'm here on behalf of U.S. Bank

1 National Association as trustee.

2 And our -- U.S. Bank's concern with -- in connection
3 with this motion is primarily a concern that the motion to
4 purchase these particular securities, and thereby purchase the
5 rights that particular notes or certificates might have, might
6 be used to squeeze out the minority of noteholders in a
7 particular transaction or for other coercive purposes.

8 In a lot of these transactions, the key economic
9 driver is really a credit default swap in which an issuer in
10 these special-purpose vehicles and the debtors entered into as
11 part of the transaction. And in these transactions it was
12 generally the case that the debtors were the ones that
13 purchased the protection, meaning that in the event that there
14 was some defined credit event under the terms of the swap
15 agreement, that the issuer would then owe them a cash
16 settlement payment.

17 And, again, most of these transactions were terminated
18 as a result of the filing of the bankruptcy petitions, first by
19 LBHI and thereafter by the other credit -- the other swap
20 counterparty, generally LBSF, and as a result it generally
21 triggered a right to termination payment under the terms of
22 another credit default agreement. However, as a result of
23 various priority-of-payment provisions, as Your Honor is very
24 well aware of, often contained in both the indenture and in the
25 swap agreements themselves, these payments may be subordinated

1 to payments that might be owed to holders under the terms of
2 the agreements. And obviously there's all sorts of litigation
3 going on before Your Honor and in other courts relating to
4 those particular issues.

5 But the key is, in this thing, is that the termination
6 payment in each of these cases may be very, very significant,
7 and it obviously depends upon a number of factors: you know,
8 the reference entities that are involved in those things; the
9 duration of the swap; whether or not there's a loss threshold.
10 But not only might the termination payment be significant in
11 and of itself, but there also might be significant issues in
12 how one goes about calculating a termination payment for these
13 particular credit default swaps. At the time that Lehman went
14 into bankruptcy, I'm not sure exactly what the state of the
15 market was as it related to someone coming in and stepping into
16 their shares to determine whether or not that person would be
17 willing to pay a particular amount for that particular swap
18 agreement.

19 So there are issues not only with priority of
20 payments, but there may be significant issues, as well, as how
21 one goes about calculating what that termination payment might
22 be. And so there are potentially large dollars at stake for
23 both the debtors as a credit -- as a swap counterparty, as well
24 as for bondholders in these particular transactions.

25 And as the debtors pointed out, there are all sorts of

1 different types of documents, and they have varied rights. In
2 some cases, a majority of noteholders has the right to take
3 certain action to direct trustees; in other cases, there's a
4 supermajority required, in some cases maybe a majority is
5 required, to take certain action. Again, it's hard to
6 generalize because they're all so different. But the trustee's
7 concerned that the debtors might be seeking to purchase these
8 notes with a view towards exercising those noteholder rights to
9 reach some kind of a settlement of the transaction against the
10 will of the minority noteholders to the sole or primary benefit
11 for themselves, not as a noteholder but to enhance their
12 position in connection with the credit default swap termination
13 payment. This is particularly true where that termination
14 payment might be significant or there's a significant
15 disagreement as to the terminat -- how the termination payment
16 should be calculated.

17 And the concern is that the debtors won't act as a
18 rational noteholder or certificate holder would in this
19 particular situation but, rather, in a manner that's in the
20 best interest of the termination payment that might be due the
21 debtors under the swap, which seems to be a clear conflict of
22 interest of some type.

23 THE COURT: Let me stop you for a second, because I
24 understand your argument, but what does that have to do with
25 what's before the Court today? That's something that might

1 happen, but then again it might not happen. The authority to
2 purchase doesn't necessarily mean that a purchase will take
3 place. And even if a purchase does take place, there's nothing
4 to indicate that this parade of horrors that you lay out will
5 ever occur. It's highly speculative, it seems.

6 MR. TOP: I would respond in this way, Your Honor.
7 First of all, we acknowledge that there are situations where it
8 may be totally appropriate. For example, if you reached a
9 resolution with a majority of holders in a particular
10 transaction and you're just trying to take care of the
11 remainder of the transactions, seems appropriate that you might
12 make an offer to those minority bondholders to buy them out by
13 purchasing their securities. That seems to be an appropriate
14 use of this particular thing. Or if the debtors decided that
15 boy, the best solution here is these notes are trading at such
16 a discount we're just going to buy them all, and then collapse
17 the entire transaction, that certainly is appropriate as well.

18 It's just in this particular -- in this situation,
19 which I think will probably more -- may be more likely than the
20 Court might think, where the debtors might take a majority
21 piece, use their voting rights or whatever other rights it
22 might have under the indenture, to the detriment of minority
23 noteholders, not, again, as a rational noteholder might do but,
24 again, to try to prefer their position on their credit default
25 swap agreement --

1 THE COURT: Let's just say --

2 MR. TOP: -- and --

3 THE COURT: Let's just say, for the sake of
4 discussion, that that's what happens. What's the court of
5 competent jurisdiction that should decide such a dispute?

6 MR. TOP: Well, I would suspect that, again, it
7 depends upon how the context of this particular proceeding
8 would --

9 THE COURT: But aren't we talking about noteholders of
10 nondebtor SPVs?

11 MR. TOP: Non -- that is correct, but I would suspect
12 that the debtors might try to enforce rights in this particular
13 court.

14 THE COURT: Well, they might, but then again they
15 might not. And would you, as the indentured trustee of the
16 SPV, be seeking guidance from this Court, or would you be going
17 elsewhere?

18 MR. TOP: Your Honor, again, it would depend upon the
19 facts and circumstances at the time, how noteholders might
20 direct the trustee, what type of action the trustee ought to
21 take in that particular circumstance.

22 THE COURT: It seems to me you're agreeing, then, that
23 there's no one roadmap to the future that we can look to.

24 MR. TOP: No, the problem, though, is, Your Honor,
25 that, again, there might be significant amounts of money that

1 are expended in connection with buying up some of these notes
2 and some of these certificates. And to a certain extent, then,
3 the horse is already out of the barn; what we're buying is a
4 potential dispute.

5 And so we thought it would be appropriate to bring
6 this particular circumstance up to the Court so that the Court
7 at least understand the trustee's concern in connection with
8 this -- these types of transactions.

9 We think that there might be things that could be
10 done, in giving the approval, that might help the situation,
11 perhaps where the debtors intend to use these notes or
12 certificates in a coercive manner; perhaps those are situations
13 that ought to be brought to the Court -- Court's attention
14 prior to buying the securities. Or perhaps there should be an
15 admonition against using them coercively. I don't know.

16 But, again, what we're ask -- what they may be asking
17 the Court to do is approve the expenditure of a large amount of
18 money, in which case to a certain extent the horse is already
19 out of the barn.

20 THE COURT: Okay. I understand your argument. Are
21 you really here more in the nature of letting me know about
22 your concerns, or are you here seeking to block the approval of
23 this program to acquire notes?

24 MR. TOP: Well, I would -- I am not -- again, we are
25 not against the purchase of all notes and certificates by SPVs

1 at this point, but, you know, to the extent that they are
2 intended to be used in a coercive manner, we think that those
3 ought to be blocked until it can be examined how they're going
4 to be used.

5 THE COURT: Well, the use of the term "coercive" is a
6 fairly colorful and judgmental term. I think coercive may be
7 in the eye of the beholder. Are you suggesting as a neutral
8 trustee that definitionally an acquisition by a Lehman Brothers
9 entity of these notes, in order to achieve a desirable
10 commercial purpose, is coercive?

11 MR. TOP: Again, desirable commercial -- I'm not sure
12 what you mean by "desirable commercial purpose".

13 THE COURT: Make money --

14 MR. TOP: I think we are concerned about --

15 THE COURT: Make money, avoid litigation, hedge
16 against risk. Those are all things that a nondebtor would do,
17 and may be doing now.

18 MR. TOP: Right. But our concern is to the -- is
19 using the rights of these notes and certificates to force
20 something down -- to force a solution on a minority noteholder
21 that might not otherwise select that particular method of
22 resolution, particularly in the circumstance where that
23 minority noteholder may not be getting what might be otherwise
24 deemed fair value because of this situation.

25 THE COURT: So is it your principal concern to protect

1 the interests of the as yet unidentified minority holders?

2 MR. TOP: That's correct.

3 THE COURT: Okay. I understand.

4 MR. TOP: And, Your Honor, we do think -- well, I have
5 not found a case that's remotely similar to a situation where
6 there's a swap counterparty and noteholder on the other side,
7 but we do think that there are some things that Courts have
8 done in the past, in connection with voting on a plan of
9 reorganization, for example, where --

10 THE COURT: I don't view that as analogous here at
11 all.

12 MR. TOP: Well, it's -- again, it's -- I agree with
13 you it's not identical, but a lot of the same concerns in that
14 kind of a situation arise in this particular situation as well.
15 And the same was true in the early '90s of exit consents where
16 you have a group of majority noteholders approving of an
17 amendment to an indenture, which in fact they were not going to
18 be party to, however, because they were being paid out on the
19 other side.

20 So, I mean, there are circumstances that, you know,
21 Courts have looked to in the past to determine whether or not
22 the use of a particular right was appropriate or inappropriate
23 in the context of that situation.

24 Your Honor, well, I did -- we did raise some points on
25 particular provisions in the indentures and things like that

1 that may be stumbling blocks in all of this. From what I
2 understand, the debtors are agreeing to add language in
3 connection -- to reserve the rights of parties with respect to
4 the language in the indentures. I don't think they're
5 intending to change those rights. So with that, I'm not going
6 to say anything further about our objection.

7 THE COURT: Okay. Fine.

8 The objection is noted but overruled --

9 MR. LEVINE: Thank you, Your Honor.

10 THE COURT: -- with the understanding that the form of
11 order to be submitted will be modified in a fashion acceptable
12 to counsel for U.S. Bank, as it relates to the offers made at
13 the opening of today's argument by debtors' counsel to put in
14 some protective language. I don't know what that language is,
15 but I'm sure it'll be innocuous.

16 MR. LEVINE: Right, right. Your Honor, as I
17 understand and simply want to make clear that Your Honor's
18 order is not prejudging any of the issues that Mr. Top is
19 referring to.

20 THE COURT: You don't even need language that says
21 that. It's very clear to me that nothing in this order is
22 intended to prejudge issues that aren't yet ripe.

23 MR. LEVINE: So, Mr. Top, do you still want to add
24 that language, or are you comfortable based on that statement
25 that we can go ahead with the present order?

1 MR. TOP: I think it's probably better for the record,
2 as there's other people looking at the case, that maybe we just
3 have a couple of -- just a sentence.

4 But I agree with Your Honor that it could be very
5 innocuous, so that should be easily be --

6 MR. LEVINE: Okay, Your Honor, we'll take care of
7 that.

8 THE COURT: Fine.

9 MR. LEVINE: I don't think it's going to be a problem.

10 THE COURT: Okay.

11 MR. LEVINE: Thank you, Your Honor.

12 MR. WAISMAN: Your Honor, now that that matter's
13 concluded, I think there are a few people that may want to be
14 excused as they have no interest in the rest of the calendar,
15 if that's okay.

16 THE COURT: Anyone who would like to leave is free to
17 leave.

18 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

19 MR. WAISMAN: Your Honor, we now turn to the claims
20 portion of the agenda. There are three claims matters to be
21 argued today. The first two listed on the second page of the
22 agenda that we filed last night, matters 2 and 3, are the
23 motions of Simeon Moreno. I believe Mr. Moreno's counsel is
24 participating by telephone this morning.

25 THE COURT: Is Mr. Moreno's counsel on the telephone?

1 (Telephone interference)

2 MS. DISCEPOLO: Hello. Can you hear me?

3 THE COURT: What planet are you on? Are you calling
4 from Boston?

5 MS. DISCEPOLO: Yes, I am. From Waltham, Your Honor.
6 My name is Sara Discepolo. I'm an attorney for Simeon Moreno.

7 THE COURT: Okay. Fine. I just wanted to make sure
8 you were on and my reference was to the feedback that we heard
9 on the line that made it sound as --

10 MS. DISCEPOLO: I understand.

11 THE COURT: -- made it sound as if you're on an
12 orbiting satellite.

13 MS. DISCEPOLO: Well, I heard that too. It scared me
14 as well.

15 THE COURT: All right. This is your motion, so, why
16 don't you proceed.

17 MS. DISCEPOLO: Okay, Your Honor. I don't know if
18 you'd like me to give you some very brief chronology, but I'll
19 just begin by saying that there are two motions before you and
20 there are two issues. One is the automatic stay and the other
21 is a type of claim or a mechanical or Mr. Moreno's claim in
22 this case.

23 First, I'll just proceed under the motion, under 28
24 U.S.C. Section 959; it's the second motion I filed. And it's
25 based on the fact that in Mr. Moreno's own bankruptcy here in

1 Massachusetts, Lehman Brothers filed a proof of claim to serve
2 it's servicer in November of 2008. That was two months -- yes,
3 two months after Lehman's bankruptcy filing, so, it's post-
4 petition. And it's around the date and even before it, Lehman
5 Brothers subsidiary, a wholly-owned indirect subsidiary,
6 Property Asset Management, have been trying to foreclose.

7 Now, the subsidiary in its March 2009 motion for
8 relief of stay in that case, I'm not the bankruptcy lawyer for
9 that case; I filed an adversary proceeding December of '09, but
10 in March of '09 the subsidiary filed a motion for a relief from
11 stay and described itself as a secured creditor. The
12 foreclosure was scheduled for December of '09, that's when I
13 got involved, filed an adversary proceeding and request for
14 injunctive relief based upon imminent foreclosure. And it was
15 at that hearing for the first time that my client found out
16 that Lehman Brothers that it's claiming to be the creditor and
17 owner of the loan.

18 After that happened, within approximately thirty days,
19 on Mr. Moreno's behalf, I filed a proof of claim in your case.
20 And the types of claims in the adversary proceeding are based
21 upon two sets of transactions and occurrences. One is that the
22 loan itself is predatory and the proper disclosures weren't
23 made. And the other is -- the other sets of the transactions
24 and occurrences is based upon the improper foreclosure by a
25 Lehman subsidiary.

1 At the end of December '09, on behalf of Mr. Moreno, I
2 sent Lehman Brothers a notice of rescission under truth and
3 lending laws. And subsequent to that, the subsidiary pursued
4 the foreclosure and -- through it's motion for relief of the
5 stay. The Massachusetts Bankruptcy Court, in December,
6 reinstated its stay and set it down for an evidentiary hearing
7 on the subsidiary motion for relief from stay. That took place
8 in April.

9 At that time, at the hearing, the subsidiary brought
10 in a witness from Lehman Brothers to testify on its behalf.
11 And I attended in my reply motion -- my reply brief, the
12 affidavit admitted into evidence in that case in which Lehman
13 Brothers states that its subsidiary is doing everything at the
14 direction of Lehman Brothers, etcetera.

15 So, there is this agreement between Lehman Brothers
16 and its subsidiary to foreclose. And my motion, my Section 959
17 motion, requests that you declare the automatic stay as
18 inapplicable to any of Mr. Moreno's claims in the bankruptcy
19 case that spin out of the proof of claim filed by Lehman's
20 servicer.

21 THE COURT: Let me stop you for a second because I
22 think I have read that Lehman doesn't have an issue with
23 providing what amounts to consensual relief from the automatic
24 stay to permit litigation to proceed in the Boston bankruptcy
25 court, is that correct?

1 MS. DISCEPOLO: Actually --

2 MR. BERNSTEIN: Yes, Your Honor.

3 MS. DISCEPOLO: -- I don't believe that's correct,
4 Your Honor. I don't want to speak for Lehman Brothers, but --

5 THE COURT: But counsel for Lehman Brothers just stood
6 up and said that's correct.

7 MS. DISCEPOLO: Well, that's not what the objection
8 says. The objection says they are consenting to a limited
9 relief of the automatic stay based upon --

10 THE COURT: If that's not good enough -- if that's not
11 good enough, I'd like to understand why that's not good enough.

12 MS. DISCEPOLO: Okay. Well, the reason it's not good
13 enough, Your Honor, is that under Section 959 and federal
14 common law, Lehman Brothers waived immunity from all claims not
15 just ones related to the determination of the note and the
16 mortgage. There are other issues in the case besides whether
17 the note and the mortgage -- issues related to that.

18 For example, Lehman Brothers, when it received the
19 notes of rescission in December of '09, didn't do anything to
20 terminate the mortgage. And that in itself is a violation
21 under the federal and state truth in lending laws.

22 Second, there are claims against a subsidiary and
23 there will be claims against Lehman Brothers for a joint
24 venture between Lehman Brothers and its subsidiary in taking
25 improper actions to foreclose where the subsidiary, number one,

1 doesn't have standing to foreclose. And number two, it
2 continues to try to foreclose where the mortgage has been
3 voided by operation of law under rescission statute. So, there
4 are more issues in the case. And --

5 THE COURT: Yes, but let me stop you. Aren't those
6 issues all issues that are before the bankruptcy court in
7 Boston and they're not issues that are presently in front of me
8 except to the extent that you are now making argument based on
9 those issues?

10 MS. DISCEPOLO: Well, let me explain why I'm coming to
11 you. Under Section 959, Lehman's actions are the debtor in
12 possession and I can't file suit against Lehman without going
13 to any court. However, the better course of practice is to go
14 to the reorganization court and seek a Court order declaring
15 the automatic stay inapplicable. Because under Section 959,
16 it's not a matter of waiving some or limiting some relief under
17 the automatic stay. The automatic stay has no applicability in
18 my case whatsoever and I'm simply going to you for you to
19 declare it so that there won't be any argument that I am
20 violating any automatic stay. In other words, I just want to
21 do this correctly and get a declaration from the reorganization
22 board that under Section 959, and also under federal common law
23 because they waived any immunity when they filed their proof of
24 claim, that the automatic stay just doesn't apply at all to any
25 claims in that case. That's the first issue.

1 THE COURT: Well, let's deal with the first issue
2 because I think that it's more likely than not covered by
3 Lehman's agreement even though you don't like the term
4 "limited" to consent to have these issues litigated in the
5 Boston bankruptcy court. So, I'm going to ask Lehman's counsel
6 a fairly narrow question which is whether the litigation, which
7 has been brought in the Boston court, can proceed in accordance
8 with whatever ordinary practice the Boston bankruptcy judge
9 establishes for that case without any concern as to the
10 automatic stay. To the extent that's not true, what are the
11 impediments to proceeding?

12 MR. BERNSTEIN: Your Honor, the debtors agree with
13 your statement that is to proceed in the Massachusetts court.

14 THE COURT: In that sense, the motion is moot by which
15 the agreement made by Lehman. You can proceed in Boston;
16 Lehman consents. Now, you don't need further relief from me.

17 MS. DISCEPOLO: Okay. The only other issue, Your
18 Honor, is the type of claim that Mr. Moreno has. I have argued
19 in the Section 959 motion that all of his claims and the
20 damages that might result and payable by Lehman, would be
21 administrative expense priority claims.

22 THE COURT: I'm not deciding that today. You're going
23 to have to move your case in Boston a lot farther along than it
24 is right now in order to have a predicate for determining the
25 type of claim. And as to the lateness of the claim, that will

1 be a subject to be litigated when you're physically present in
2 this courtroom. You're not going to do it on the telephone.

3 You've had permission to appear by phone, but as to
4 issues of late-filed claims I'm not deciding that issue for you
5 today at all. It's deferred until after there is a
6 determination, a final determination, of whatever is now
7 proceeding in Boston. It's without prejudice to your rights
8 whenever you come back. The motion will be carried and not
9 decided today.

10 MS. DISCEPOLO: Okay. Thank you, Your Honor.

11 Oh, Your Honor, will you be issuing an order or
12 anything?

13 THE COURT: The debtors will propose a form of order
14 consistent with the colloquy that we've had on the record today
15 which you'll have a chance to review and approve before it's
16 entered. Okay?

17 MS. DISCEPOLO: Okay. And how do I review it? How do
18 I get a chance to be heard if I find out it's not in accordance
19 with today's decision?

20 THE COURT: You're going to have to talk with Weil,
21 Gotshal & Manges' lawyers probably on a number of occasions to
22 get it right to your satisfaction. And you're at a
23 disadvantage in that you're in Boston or Waltham, but you may
24 have to get on a train or a plane or just exchange a lot of e-
25 mails and at some point you'll have consensus.

1 You're at a disadvantage in that you're representing
2 an individual client in a case which is in New York. And I
3 recognize that this is an important matter for Mr. Moreno, but
4 you are one of -- I think it's sixty-six thousand creditors.
5 So, remember that you're not any less important nor are you any
6 more important than any of the others.

7 MS. DISCEPOLO: Well, just for clarification, Your
8 Honor, now, you're saying that I can come back for any
9 administrative expense priority claim --

10 THE COURT: I am not determining today any entitlement
11 to administrative priority and I think you should assume that
12 that's in your best interest. Because if I were to decide it
13 today, you would end up on the wrong end of that issue.

14 MR. BERNSTEIN: Your Honor --

15 THE COURT: So, sometimes it's better to say less.

16 My suggestion to you is that you have a discussion
17 with counsel for the debtor as to the form of order and that
18 you continue with your litigation consistent with that order in
19 Boston to the point that you reach a resolution either by
20 agreement or adjudication. To the extent that you have other
21 claims, you should know that in today's docket, there are
22 numerous other late-filed claims that are before me. It is
23 highly unlikely that you will be granted leave to file a late-
24 filed claim without demonstrating that you fit within the
25 pioneer standards.

1 Second Circuit law is extremely strict with respect to
2 late-filed claims. I am not deciding your claim today nor am I
3 determining whether or not it is an administrative claim and I
4 believe that you should have some useful conversations with
5 debtors' counsel, not only as to the form of the order, but as
6 to some kind of consensual resolution of your dispute. That
7 would be time --

8 MS. DISCEPOLO: Well, I --

9 THE COURT: -- that will be time well spent.

10 MS. DISCEPOLO: -- well, I'll do that, Your Honor, but
11 in my first motion, I did ask for the claim to be timely filed
12 and that --

13 THE COURT: I'm not deciding that today. Didn't you
14 hear me say that? I wasn't deciding that question.

15 MS. DISCEPOLO: Okay. Well, then, Your Honor, is
16 there a claims procedure that -- I saw on the docket that there
17 will be some claims procedure. Is my client going to be
18 subject to that?

19 THE COURT: My strong suggestion to you and what you
20 can't see because you're on the telephone is that there are
21 probably thirty-five people in the courtroom listening to this
22 conversation. It's an incredibly wasteful use of judicial time
23 and the time that the lawyers listening.

24 I've said to you on repeat occasions and I'm going to
25 say it for what may be the fourth time, please talk to debtors'

1 counsel. If you have questions, they'll be answered, I'm sure.
2 It's not my position to respond to your questions. This matter
3 will be carried to another day following the entry of the order
4 that we've just talked about which will permit you to litigate
5 this issue in Boston and that's the only matter that being
6 decided today.

7 MR. WAISMAN: Shai Waisman, Your Honor, we will draft
8 a proposed order and -- consistent with Your Honor's ruling
9 today and share it with Ms. Moreno (sic) and hopefully come to
10 a consensus on the order and submit it to chambers. We have
11 spoken extensively to Mr. Moreno's counsel and will continue to
12 do so.

13 THE COURT: Fine, thank you.

14 MR. WAISMAN: Your Honor, the next matter on the
15 agenda, and this is the final matter to be argued today, is on
16 page 2 of the agenda, item number 4, first motion of Mark
17 Glasser to extend time for claim.

18 MR. BRANOWER: Good morning, Your Honor. For
19 Mr. Glasser, Daniel Branower, Gusrae, Kaplan, Bruno & Nusbaum.

20 I'll be brief, Your Honor. Mr. Glasser has a claim in
21 connection with a bonus he earned while he was working for
22 Lehman Brothers broker/dealer in August of 2008. After that,
23 he moved from Lehman to Barclays and to his eyes things
24 generally appeared to be the same. Quite simply, he didn't
25 realize that he had to vigilant with respect to his mail in

1 terms of looking for a notice of a bar date for -- concerning
2 his claim.

3 THE COURT: Can I ask you a question?

4 MR. BRANOWER: Yes, Your Honor.

5 THE COURT: How is it possible for someone who was a
6 former Lehman employee who was working, I presume, at -- was he
7 working at 757 7th Avenue?

8 MR. BRANOWER: I'm not certain of that, Your Honor. I
9 don't know.

10 THE COURT: Was he working with other people who had
11 been Lehman employees?

12 MR. BRANOWER: Yes, Your Honor.

13 THE COURT: How is it possible for someone who's
14 working with a group of people who are all concerned about
15 their claims against Lehman not to know about the bar date?
16 That's -- that's borderline incredible to me.

17 MR. BRANOWER: Your Honor, I think -- I understand
18 Your Honor's sentiment. At the same time, Your Honor, he had
19 assumed because he was working with all the same people that he
20 would be notif -- that he would be informed, that he would get
21 a little more guidance from his employer and that he would be
22 walked through the process a little more than he was. It
23 wasn't until after the bar date passed that he realized gee,
24 this is taking a long time, I don't know what's going on.

25 THE COURT: Did he know that there was a bar date?

1 MR. BRANOWER: I don't believe he did, Your Honor. I
2 think he expected that he would be walked through it through --

3 THE COURT: What's his position?

4 MR. BRANOWER: I'm sorry.

5 THE COURT: What does he do at Barclays and what did
6 he do at Lehman?

7 MR. BRANOWER: He's a broker -- a broker, Your Honor.
8 A registered representative. A securities salesman.

9 THE COURT: Okay. So, proceed with your argument.

10 MR. BRANOWER: That's essentially it, Your Honor.
11 He -- the debtor has attached papers showing that notice was
12 delivered to an address. That was an apartment he leased. He
13 had no longer lived there and he wasn't as vigilant as he
14 should have been in terms of keeping track of the mail that was
15 sent to the apartment. But again, Your Honor, he was in touch
16 with his employer, you know, he went to work every day and he
17 communicated with them through e-mail, so, he didn't realize
18 that that was where he was going to be leaving -- going to be
19 getting legally significant documents and that he would have to
20 do something within this proceeding.

21 THE COURT: At the time that the bar date notice was
22 sent to that address, what was his domicile?

23 MR. BRANOWER: His domicile was, I believe, 465 East
24 65th Street at the time the notice was sent.

25 THE COURT: And the notice was sent to what address?

1 MR. BRANOWER: To 157 East 57th Street.

2 THE COURT: And was that an occupied apartment or a
3 vacant apartment?

4 MR. BRANOWER: I believe it was a vacant apartment,
5 Your Honor.

6 THE COURT: And did he receive other mail at that
7 address?

8 MR. BRANOWER: He did receive other mail at that
9 address which he would occasionally pick up and had tried to
10 coordinate with his doorman to occasionally get to that mail.

11 THE COURT: Okay. I hear you. This is a distinctly
12 unpersuasive argument, no offense.

13 MR. BRANOWER: I can't change the facts, Your Honor.

14 THE COURT: The facts aren't good for you. Is your
15 client present?

16 MR. BRANOWER: No, Your Honor.

17 THE COURT: I'll hear from the debtor.

18 MR. BERNSTEIN: Good morning, Your Honor. Mark
19 Bernstein, Weil, Gotshal & Manges for the Chapter 11 debtors.
20 The debtors are prepared to rest on their papers on this
21 matter. I mean we don't believe this satisfies the standard
22 for relief under 9006(b) in this jurisdiction.

23 MR. BRANOWER: Nothing further, Your Honor.

24 THE COURT: Okay. This is an unusual circumstance, in
25 part, because this is the sort of matter that would lead to the

1 stipulation of facts or an evidentiary hearing in order for
2 there to be a sufficient record for the Court to decide the
3 question. And the parties are acting as if the record has been
4 made on the basis of scant paperwork that has been filed.
5 There's a two page declaration which I read from your client
6 and you've made an argument which is consistent with that
7 paperwork. But there's some credibility issues here.

8 If I were to look purely at the declaration of your
9 client and rely solely on that, I would have a hard time
10 granting them the relief.

11 It is acknowledged that notice was sent to an address
12 that was, in fact, this former employee's home address. He
13 continued to collect mail from this apartment even though based
14 upon the representations of counsel it seems he did not reside
15 there at the time.

16 Ordinarily, people arrange to have their mail
17 forwarded or they assume the risk that mail which is not
18 collected may, in fact, be important. On that basis, absent
19 some showing of extraordinary cause, mail that was delivered to
20 a proper address but that wasn't timely collected, in my view
21 should be deemed actual or constructive notice of the bar date.

22 If there were some compelling circumstance, which has
23 not yet been presented to me, indicating personal hardship,
24 incapacity, an inability to collect the mail, mental
25 impairment, something that rises to a level of compelling

1 excusable neglect, I might feel differently about this issue.
2 But this seems to me to fall into the area of inexcusable
3 neglect.

4 What is particularly hard for me to fathom, is how an
5 employee who was a former Lehman employee who migrated to
6 Barclays along with ten thousand or so other colleagues could
7 not know about the bar date. Proverbial water cooler chatter
8 should be sufficient to put every employee on the functional
9 equivalent of notice as well. It seems to me inconceivable
10 that the internal discussions among employees did not at some
11 point turn to, so, what are we going to do about our claims
12 against Lehman? I cannot imagine that anybody who was not in a
13 cocoon and who worked at Barclays did not know that a bar date
14 had been set in the case. Additionally, beyond actual delivery
15 of notice, there was constructive notice, conspicuous notice on
16 websites that I'm certain all former employee -- Lehman
17 employees had access to. And absent some further showing, I
18 find that this employee has failed to demonstrate cause for
19 relief from the bar date consistent with applicable Second
20 Circuit precedent.

21 I make this finding, however, without prejudice to the
22 claimant's ability to request an evidentiary hearing to the
23 extent that he is able to credibly present evidence here, on
24 one of the upcoming adversary proceeding dates. To overcome my
25 conclusions by demonstrating that, in fact, he did live within

1 a cocoon, he would have to show that he worked alone, that he
2 didn't talk to anybody and somehow make that credible to me.
3 Because I'm visualizing somebody who is on a trading floor
4 surrounded by phones and people and that who occasionally goes
5 to the men's room.

6 For these reasons I find that it's probably unlikely
7 that he'll be able to make such a showing and it will be up to
8 him and his counsel to determine if it's worth doing and
9 ultimately it will be his credibility that will be on the line.

10 So that this doesn't linger, the decision to either
11 proceed this way or to abandon the claim should be made within
12 the next thirty days.

13 MR. BRANOWER: Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. WAISMAN: Shai Waisman, Your Honor. I believe
16 that concludes the matters to be heard this morning on the
17 agenda. The rest of the matters are the claims matters that
18 are on submission.

19 THE COURT: May I ask a question about that list? And
20 if I'm remembering correctly, there was a matter involving
21 Palmyra that was a late-filed claim that was adjourned from the
22 omnibus hearing in March that hasn't popped up on this list.
23 And one of the things that I was going to do was to hear -- I
24 may have the name wrong, but I think that's the right name, I
25 was going to hear that one and then add that to the list of

1 others and then come up with a global resolution of all of the
2 late-filed claims.

3 MR. WAISMAN: Your Honor is correct. That was the
4 Palmyra matter. Palmyra filed a notice withdrawing their
5 motion a week, two weeks ago, on the docket and served it on
6 the service list.

7 THE COURT: This was the Paul Hastings notice, I
8 think?

9 MR. WAISMAN: That's correct.

10 THE COURT: All right. I didn't understand that when
11 it was filed. I guess that means that's no longer an issue I
12 need to consider.

13 MR. WAISMAN: It is no longer an issue you need to
14 consider and not one that should come up.

15 THE COURT: What I will be doing is issuing a written
16 decision in due course. It won't be more than a few weeks
17 which will deal with each of the pending matters and there's no
18 need to carry this to the next omnibus hearing. It will be
19 decided on the papers.

20 MR. WAISMAN: Very well, Your Honor.

21 THE COURT: Okay.

22 MR. WAISMAN: Thank you.

23 THE COURT: We're adjourned for today. Thank you.

24 (Proceedings concluded at 11:03 AM)
25

I N D E X

E X H I B I T S

PARTY	NO	DESCRIPTION	ID.	EVID.
Debtors		Declaration of Daniel Ehrman (ph.)		19

R U L I N G S

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Clara Rubin
AAERT Certified Electronic Transcriber (CET**D-491)

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Date: April 21, 2010